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Brexit

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Brexit – A view from Scotland

- Brexit has proved to be a major issue of constitutional contention between the UK and Scottish governments, with the Supreme Court now scheduled to play a vital role.
- The constitutional arguments over where powers returning from Brussels are to be held and how common frameworks are to be developed has resulted in separate legislation dealing with the carry-over of EU law on UK and devolved matters.
- The Scottish Bill's competence is to be tested in the Supreme Court.
- Arrangements for environmental principles and governance are being discussed at both UK and Scottish levels, but with different sets of principles and different timescales which make it more challenging to achieve strong collaboration.

In the referendum in 2016 there was in Scotland a clear majority in favour of remaining in the EU, with a 62% vote in favour of Remain. Recognising that the UK would be leaving the EU, the Scottish Government's policy has long been in favour of staying in Single Market and Customs Union. In its policy paper *Scotland's Place in Europe*, published in December 2016 { [HYPERLINK "http://www.gov.scot/Resource/0051/00512073.pdf"](http://www.gov.scot/Resource/0051/00512073.pdf) }, it also called for:

- a "differentiated" position for Scotland that would allow Scotland to retain close alignment with the EU regardless of what arrangements were made for the rest of the UK;
- all powers in non-reserved areas currently exercised in Brussels to return to Edinburgh;
- additional powers to be transferred to Scotland in some areas dominated by the EU (e.g. health and safety); and
- the establishment of a means for Scotland to create international agreements in areas of devolved power.

This is not the course that has been followed by the UK authorities.

Constitutional Disagreement

As the UK Government has struggled to define its own position, relations between London and Edinburgh have been dominated by the major constitutional row over where the powers returning from Brussels are to rest. The Scottish position is simple, namely that all power in matters not expressly reserved to the UK under the Scotland Act 1998 (as amended) should come to Edinburgh. The devolution settlement created a clear divide between a limited list of reserved matters that are for the UK institutions to handle, and everything else which is within the competence of the Scottish authorities. To provide for any non-reserved powers to rest, even temporarily, in London, it is argued, would disregard the fundamentals of the devolution settlement.

The UK position is that certain non-reserved powers should initially come to London to allow for an assessment of where uniform measures across the UK are needed, and for appropriate action to be taken, before the powers are passed on to devolved administrations. Many powers could be passed on immediately and even where there was a delay, it is argued that in practice this would mean that there is no less control exercised in Edinburgh than at present, with the prospect of a rapid increase in exercisable powers as areas of responsibility are transferred from Westminster.

In the absence of any resolution, this dispute continued throughout the debates of the European Union (Withdrawal) Bill, which was finally passed in a form reflecting the UK Government's position. The Bill completed its passage without the legislative consent from the Scottish Parliament which is "normally" a pre-requisite for legislation at Westminster that affects Scotland (Scotland Act 1998, s.28(8)). This absence of consent is not a legal obstacle to the legislation being made, but although the Withdrawal Act now states the law, it has not ended the political arguments.

One consequence of the constitutional impasse has been that the Scottish Parliament has passed its own legislation to deal with the carry-over of EU law within the areas of devolved competence. The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, which has completed all its parliamentary stages, is broadly parallel to the EU (Withdrawal) Act 2018 in retaining existing EU law and giving Ministers powers to make the adjustments necessary for it to operate, but with some differences. Of particular environmental significance:

- the general principles of EU law and the Charter of Fundamental Rights are retained as part of the law (s.5);
- in the exercise of “tidy up” powers to allow “retained EU law” to operate, Scottish Ministers must have regard to environmental principles and animal welfare (see below) (s.13B);
- the Ministers must within six months produce and consult on proposals on guiding principles on the environment and effective and appropriate governance relating to the environment (s.26A).

When introduced into the Scottish Parliament there was disagreement between the Presiding Officer and the Government over whether all the terms of the Bill fell within devolved competence and Royal Assent has been delayed since the Advocate General has now referred this issue to the Supreme Court (hearings are scheduled for 24 and 25 July). Whatever the Court decides, there will be further work to be done to clarify the arrangements for the continuity of EU law in devolved and reserved areas.

Common Frameworks

The depth of the constitutional disagreement over where powers should lie has unfortunately overwhelmed the depth of agreement over the need for some issues to be dealt with on a collaborative basis for the UK as a whole. All sides agree on the need for common frameworks in some areas, for environmental reasons among others. Indeed in October 2017 all the administrations agreed in the Joint Ministerial Council that common frameworks should be established where they are necessary in order to:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK.

{ HYPERLINK

"https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf" }

What followed, though, was not an open and principled discussion with stakeholders of where these criteria might be met. Instead there just emerged from London (with an unknown element of discussion with other authorities) a list of areas where frameworks were considered necessary. Moreover there is still no agreement on how the frameworks are to be developed – through imposition from London, through full agreement with all the administrations, or something in-between. The EU (Withdrawal) Act sets out procedures that hope for discussion with and consent from the devolved parliaments, but ultimately allow for rules to be made in London without agreement, even on devolved matters. This leaves open questions over scrutiny and accountability, between the administrations and between the Executive and Parliament in each case.

Environmental Principles and Governance

Environmental principles and governance have proved to be another area of some fluidity. The major consultation by DEFRA (<https://consult.defra.gov.uk/eu/environmental-principles-and-governance/>) has to some extent been upstaged by the provisions belatedly added into the EU (Withdrawal) Act 2018 (s.16) and it remains to be seen what will emerge later in the year. In relation to principles, the list included in the Scottish Continuity Bill is shorter than that in the Westminster Act. It covers:

- (a) the precautionary principle as it relates to the environment;
 - (b) that preventative action should be taken to avert environmental damage;
 - (c) that environmental damage should as a priority be rectified at source;
 - (d) that the polluter should pay;
- and also
- (e) that regard must be had to the welfare requirements of animals as sentient beings.

In terms of environmental governance, Scotland faces the same issues as for rest of UK in terms of gaps left by the loss of EU machinery. A sub-group of the Scottish Government's Roundtable on Environment and Climate Change produced a paper on *Environmental Governance in Scotland on the UK's withdrawal from the EU* which identifies the gaps that will be created and provides a range of options for consideration (<http://www.gov.scot/Publications/2018/06/2221>). The paper also recognises that with time getting short before Brexit, there may be a need for interim arrangements since it may not be possible to get any new formal statutory framework in place before the EU Commission's role in overseeing environmental compliance disappears. The Environment Minister has welcomed the paper and will be producing more detailed proposals in due course, as required by the Continuity Bill - (<https://blogs.gov.scot/rural-environment/2018/06/01/next-steps-on-environmental-governance/>).

On the key issue of collaboration across the UK, the Roundtable's paper notes the value of UK-wide co-ordination but cannot avoid the constitutional issue, simply saying that the arrangements should reflect the devolution settlement, whether that means separate bodies in the different nations working in conjunction or an agreed unified structure. DEFRA's consultation similarly holds out the prospect of discussion over various forms of collaborative working. Nevertheless, two things stand in the way of the likelihood of productive progress towards beneficial collaborative arrangements. The first is that the structural planning is progressing on different schedules – the UK Act requires a draft Bill by the end of the year, whereas the Scottish Bill's six month period for consultation and reporting will not begin until after Royal Assent which can come only after the Supreme Court's decision later in the year. Secondly, the breakdown of trust and co-operation between London and Edinburgh means that the environmental benefit of close collaboration could be a victim of the constitutional battles.

Conclusion

While we await the Supreme Court's decision on the Scottish Bill's competence, and the further political and legal discussion that will inevitably follow whatever the result, we face the prospect of having to live with two broadly parallel but different regimes for ensuring the continuation of retained EU law. This will lead to the need to identify clearly those matters which fall under the Westminster and those under the Holyrood provisions, an issue which has been largely avoided in the past given the broad powers under the European Communities Act 1972 which created shared responsibility for implementing EU law. We also have two separate programmes developing the role of environmental principles and governance, with different sets of principles embedded and the likelihood of separate governance structures which seem unlikely, in the immediate future at least, to provide any

clear means of dealing with those matters that do not fit neatly into a single administration's responsibility.

Finding a way forward will not be straightforward given the lack of trust and collaboration between the governments in London and Edinburgh. The disagreement over where powers are to rest and how common frameworks to be established is one that rests on deep constitutional principles, but means that despite the clear benefits to the environment, rapid progress seems unlikely in developing soundly integrated mechanisms and approaches for environmental regulation and governance. At least partly because membership of the EU provided a safeguard against excessive fragmentation, the devolution settlement failed to provide any strong machinery for intra-governmental co-operation and dispute resolution (other than relying on Westminster's ultimate supremacy), and this deficiency is now being exposed. The difficulty in developing a clear approach on Brexit at UK level has further muddied the waters, and has contributed to the lack of transparency, of collaboration with the devolved administrations and of stakeholder engagement at key stages in developing policy, both on Brexit in general and on the environment in particular. Still, the Cabinet meeting at Chequers in early July will surely get key issues sorted out neatly and leave everyone happy [oops!].

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